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THE RULE OF RECOVERY IN TRADE-MARK AND IN UNFAIR COMPETITION.

Perhaps no decision has been more anxiously awaited by more people than that in Hamilton-Brown Shoe Co. v. The Wolf Bros. & Co., 36 Sup. Ct. —, and now that it has appeared, its inconclusiveness is probably as disappointing as that in any case ever thus awaited. This case was discussed by us under the title, Wolf Bros. & Co. v. Hamilton Brown Shoe Co., as reported in 206 Fed. 611, in 77 Cent. L. J. 305, also a majority decision.

In this case it will be remembered that Wolf Bros. & Co., of Cincinnati, brought suit against the Hamilton-Brown Shoe Co., of St. Louis, for damages for infringing its trade-mark, "American Girl" as applied to shoes by selling a brand known as the "American Lady Shoe."

There appeared to us then an opportunity for the court both to lay down some definite rule to distinguish infringement of strict trade-mark from damages in unfair competition and the rule of recovery in the one sort of case and in the other. The Circuit Court of Appeals was far from making clear either of the above distinctions and our Supreme Court leaves us quite as greatly at sea as did the Circuit Court of Appeals.

For example, the Circuit Court of Appeals awarded recovery to the plaintiff as in a case of unfair competition and the Supreme Court appears to sustain this recovery only because it disagreed with the former court about its being a case of unfair competition, but held there was infringement of a strict common law trade-mark.

It matters little in the doctrine of the law, that the one court differed from the other in this particular, but it does matter considerably that it does not give us the precise reasons why it was necessary for affirmance for it to disagree with the lower court in the particular above stated. We infer from the brief dissent by the Chief Justice and Justice Van Devanter, that it was vital to affirmance that the infringement sued for should be held to have been of a strict trade-mark.

This is a sound principle, but the Supreme Court finding a short cut to affirmance by disagreeing to the view of the Circuit Court of Appeals casts all of the great questions, crying for determination in a class of suits, where the law needs to be conclusively settled, to the limbo of delay.

Possibly the court was right in doing this, because infringement of strict trade-mark and suits in unfair competition pertain more to the jurisdiction of state than federal courts. But this seems not well recognized by our supreme tribunal in the determination of federal law, because it harps upon the curious statement of a principle that "the true rule (of damages) is strictly analogous to that applied in patent law." Why our highest federal court should refer to a rule in strict statutory law, as a rule about patents is, and make that the criterion for the settlement of an action for a common law wrong, is somewhat amazing to us. If the saying were reversed, that is to say, the rule in patent cases is strictly analogous to that applied in trade-mark cases, the statement would be more comprehensible. This would mean that patent statutes are to be construed in their common law terms by reference to trade-mark law.

But embarking on the theory of analogy to patent law, the opinion refers to Garretson v. Clark, 111 U. S. 120, and Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 615, as showing what the rule in patent cases is. If ever one decision may be construed as overruling another, this latter case may be thought to overrule the former. At all events, the two cases do

not do more than lay down the rule of burden of proof in patent cases and when it shifts.

But the Supreme Court decision is particularly unsatisfactory to our minds in that it does not declare as a principle of law, that the violation of a trade-mark gives a right as matter of law to recovery either of profits made by an infringer or of damages caused by his infringement. The court says: "It is to be remembered that defendant does not stand as an innocent infringer. Not only do the findings of the Court of Appeals, supported by abundant evidence, show that the imitation of complainant's mark was fraudulent, but the profits included in the decree are confined to such as accrued to defendant through its persistence in the unlawful simulation in the face of the very plain notice of complainant's rights that is contained in its bill."

The case then quotes from a state case which says not a word about fraudulent conduct in infringing a strict trade-mark and the rule is laid down there that in confusion of goods he who does this must lose the mass unless he can separate them. This is a good rule, but it needed in no way for its support a rule in a statutory action in patent law. Very rightly the court cites in support of the state case above alluded to, several other state cases "to the same effect."

But, if it was necessary for affirmance to rule that using the name "The American Lady" is to use "a trade-mark in the strict sense of the term," then the line between trade-mark cases and those "non-trade-mark" remains very obscure. The court said: "We do not regard the words 'The American Girl' adopted and employed by complainant in connection with shoes of its manufacture as being a geographical or descriptive term. It does not signify that the shoes are manufactured in America or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture." Then are cited the "Lackawanna," "Columbia" mills, "Elgin" watch, "Genessee" salt, "Old Country" soap cases as not controlling and the opinion says: "If the mark here in controversy were 'American Shoes,' these cases would be quite in point."

Yet we imagine that "Columbia" was as fanciful as "American Lady," and so as to "Elgin" and "Old Country," or as "Lackawanna," and that the proof of the way they were used showed them geographical or descriptive. Standing by themselves they might have been thought fanciful or arbitrary, and so thinking, it seems to us that the dissent saying that: "The term, 'The American Girl,' as applied to women's shoes, made and sold in America, is geographical and descriptive and not subject to exclusive appropriation as a trade-mark." The dissent draws the conclusion "that upon this record a recovery of the entire profits is not admissible." But the question recurs what should have been recovered on this theory?

In this case no damages whatever were proven, but all of the testimony was directed to the question of defendant's profits and this case may be considered as settling the question that profits are recoverable in infringement of trade-mark and also in unfair competition, but not all in the latter, that is to say, if simulation is after notice by proprietor.

The report by the master in the case, Judge Henry H. Denison, is sustained, and while for a very large sum there seems some intimation, that as this was a case in strict trade-mark, it well might have been for a greater sum. This is the same master, whose report and findings were finally sustained by the Supreme Court in the noted case of Westinghouse Co. v. Wagner Mfg. Co., *supra*, which case we considered in 76 Cent. L. J. 39.

NOTES OF IMPORTANT DECISIONS.

CONVICTS—RIGHT OF ACTION AGAINST LESSEE FOR SERVICES RENDERED.—In Anderson v. Salant, 96 Atl. 425, the Supreme Court of Rhode Island goes into a tediously elaborate discussion of the status of a slave as meant by the Thirteenth Amendment and the Rhode Island Constitution, with the result of concluding that a convict's position so far as his right of contract and of inheritance and to his being a chattel of an owner, bears little or no analogy thereto. This being determined it is then considered whether he was so absolutely under the dominion of one to whom he is farmed out under statute providing therefor as to give him right of action for services rendered the State's lessee. By like reasoning, by which the court arrives at the conclusion that a convict was not to be deemed a slave, it reaches the result, that these statutes have been recognized for so many years, that there is a very strong presumption of their validity.

It is said: "The condition of slavery sought to be established is a synthetic slavery made up from the incidents inherent in the condition of being a convict lawfully under sentence and the fact that said convict was compelled to work pursuant to the contract made under the statute. * * * The plaintiff's inability to dispose of his person and property and services is in no way due to the contract of which he complains, but is an incident of his condition as a convict. * * * As we have seen, it is not claimed that to cause a prisoner to work for the State is a violation of the constitutional provision forbidding slavery, but that to cause him to work upon materials of another than the State, under a contract between such other person and the State, in the prison of the State, under the control of the State, the State receiving compensation for said work and the convict not receiving compensation therefor, results in the transformation of the labor which is imposed upon the convict as a part of his sentence, into that of a slave and constitutes a condition of slavery. If this contention is sound, it follows that while the State may compel the convict to work for the State upon the materials of the State in its workshops situated in the prison, the State must own the materials upon which the work is done or the convict cannot lawfully be compelled to work."

We have used a lengthy extract to show how very fine spun is the contention advanced. It is not asserted that the convict's punishment is in any way more severe or in any regard added to by making him work for another than the State, and it seems to us that a lessee would be deemed *pro hac vice* an officer of the State and his anticipated profit to represent a definite salary.

But independently of this hair splitting ratiocination, the constitutional provisions referred to can not be supposed to extend to statutes of duration long previous to their adoption.

WORKMEN'S COMPENSATION ACT—RECOVERY OF EMPLOYEE IN INTERSTATE COMMERCE, NO NEGLIGENCE BEING CLAIMED.—In 82 Cent. L. J. 43, and 63, there was discussed the applicability of workmen's compensation acts under any circumstances to a case of injury suffered by an employee engaged in interstate commerce, the two cases therein referred to holding that the Federal Employers' Liability Act left the State law to operate in non-negligence cases. We indicated our dissent from their conclusion.

In Winfield v. Erie R. Co., 96 Atl. 394, New Jersey Court of Errors appears to go even further than did the cases we considered.

Thus, in the Winfield case there was writ of error to the trial court to review a finding by it that an employee was not killed in the course of an interstate employment and the Supreme Court held he was and set aside a judgment in favor of plaintiff.

The Court of Errors and Appeals in reversing the Supreme Court, said: "We do not find it necessary to determine whether appellant's decedent came to his death while employed by the defendant in interstate commerce, as the Supreme Court held, or while employed in intrastate commerce, as was found by the Court of Common Pleas, but will assume for the purpose of deciding this appeal that the conclusion of the Supreme Court * * * was justified by the facts proved. The question then is whether the widow of an employee of a common carrier by railroad which is engaged in interstate commerce, who comes to his death while he is employed by such carrier in such commerce, must in all cases bring her action to recover compensation under the Federal Employers' Liability Act. This question, we think, must be answered in the negative. * * * It cannot be that when the federal act affords no remedy, the widow cannot enforce a remedy which is given her by a State

statute." But it can be if the federal statute covers the whole question of liability.

The court further says that: "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation created by Section 2 of our Workmen's Compensation Act with the consent of both employer and employee and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her or any proof offered, or any admission made by defendant company showing that the death of her decedent resulted from defendant's negligence and thus created a liability against it under the federal eral statute."

It seems a mere juggling of words to say there is not a liability but only a contractual obligation. If the contractual obligation takes in injury from tort by employer, it certainly is excluded by the federal act. And if it intended to cover the whole field of accident for which an employer in interstate commerce is liable, injury not thus arising would also be excluded.

As we urged in 82 Cent. L. J. 43, the real question is whether the federal act intended that no other burden should be put upon a carrier in interstate commerce, and, therefore, on commerce itself, than was imposed for injury occurring as in that act stated. It could have said the carrier should not be liable at all, but employees should take all risks. Did it not impliedly say they did this when the carrier was not negligent at all? The act gives a remedy to a class. Can the class have a remedy in other law?

COMMERCE—MISBRANDING DRUGS BY FALSE STATEMENT IN PACKAGE REGARDING CURATIVE EFFECTS.—The term "misbranded" is by statute made to embrace, as to drugs shipped in interstate commerce, a case where any "package or label shall bear or contain any statement, design or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." This statute was held to embrace circulars in packages containing drugs, where false and fraudulent, and as so construed it came within the power of Congress under the commerce clause. Seven Cases v. United States, 36 Sup. Ct. 190.

This ruling is predicated upon the principle that there was no encroachment upon the reserved power of the states. The court said: "The objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act. Hoke v. United States, 227 U. S. 308. There, after stating that "if the facility of interstate transportation can be denied in the case of lotteries, obscene literature, diseased cattle and persons and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations."

It is hard to see how it is necessary or even convenient to the exercise of the right to exclude misbranded drugs from interstate commerce, to declare further that no circulars shall accompany them of an untruthful nature, nor is it very apparent that if such circulars are of the nature of misbranding, that they should be both false and fraudulent, that is to say, intentionally false. For them to be false should be misbranding whether done innocently or fraudulently.

This goes to show that the falling under police power is the gist of the statute and not that police power incidentally comes in. But it is also held that the inclusion of the word "fraudulent" was in effect necessary to avoid the guaranty by the Fifth Amendment.

It is said: "Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. It was plainly to leave no doubt upon this point that the words 'false *and fraudulent*' were used. This phrase must be taken with its accepted legal meaning and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive." Here we get back to what would ordinarily be "the reserved power of the states," and how anyone could see that it only incidentally comes in, and is not the primary purpose of the statute, we do not understand. There is certainly very great temptation in Congress to help out police power, in every way it is more able to do this than states are, but the sustaining of the granting of such aid as lawful very greatly resembles dialectical gymnastics.

SOME OBSERVATIONS ON THE APPLICATION OF THE DOCTRINE OF THE LAST CLEAR CHANCE.

The application by the various courts of the doctrine of the last clear chance to the particular facts presented by each case, has caused some confusion as to the real meaning of this principle. As a consequence it is difficult to reconcile all of the cases on the subject by the application of any fixed rule.

No consideration of this doctrine can be rightly entered into without an examination of the rule of contributory negligence. The rule that contributory negligence will defeat recovery in negligence cases appears to have been first distinctly announced in the case of *Butterfield v. Forrester*,[1] though not then as a novel doctrine. There the defendant, for the purpose of making some repairs to his house, which was close by the roadside, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. The plaintiff, about candle light, but while there was yet light enough left to discern the obstruction at 100 yards distance, while riding very rapidly, rode against the pole and was thrown and badly hurt. The Court directed a jury, that "if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant." This charge was sustained on appeal.[2]

This doctrine, thus first enunciated in a most reasonable form was soon carried beyond what could ever have been contemplated by the original case. At length some courts held that any negligence on the part of the plaintiff which in any degree contributed to an accident was the proximate cause thereof, and constituted contributory negligence which barred recovery. It was further held in some cases that plaintiff must not only prove the negligence of the defendant, but must also affirmatively disprove any negligence on his part. Carried to such extremes, the doctrine became the subject of severe condemnation as a harsh and unjust rule, as it left the plaintiff to bear all the damages, although he may have been but remotely, and consequently, but slightly in fault.

The existence of these conditions, and especially in cases where human life was concerned, created a need for a more just and humane rule, and accounts for the prompt and general approval given to the doctrine now generally known as the "Last Clear Chance", or as it is sometimes referred to as the rule of antecedent and subsequent negligence.

The case of Davies v. Mann[3] is generally considered to be the case from which the above doctrine originated. In that case the owner of a donkey negligently turned it out upon the highway with its feet fettered, and the animal was killed by a party who was carelessly driving along the highway and ran into it. A recovery was allowed notwithstanding the negligence of the owner. In that case Lord Abinger, C. B., said: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must asume it to have been lawfully there. But even were it otherwise, it would have made no difference for as the defendant might, by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence though the animal might have been improperly there." And in the same case, Parke, B. says; "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace

(1) Butterfield v. Forrester, 11 East 60, 10 Revised Rep. 433.

(2) For definitions of contributory negligence see 29 Cyc, 505; 1 Sherman & Redf, Neg. (6th ed.) sec. 61. 1 Thomp. Neg. 2d ed. sec. 169.

(3) Davies v. Mann, 10 Mees & W. 546, 12 L. J. Exch. N. S.; 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190.

as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

The doctrine of the above case has been stated to be that "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it."[4] Another legal writer[5] in describing the rule as set out in the above case says, "It means only that negligence upon the part of plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury, and that it is not a proximate, but only a remote cause of the injury when the defendant notwithstanding the plaintiff's negligence, might, by the exercise of ordinary care and skill, have avoided the doing of the injury."

Mr. Beach, after considering the subject at some length, is of the opinion, that the following principles cover every case in which a correct application has been made of the rule of *Davies v. Mann*:" (a) When the plaintiff's negligence is only a remote cause of the injury he sustains, it is not contributory negligence, and he may recover; and (b) contributory negligence is no bar to an action for willful injury."[6]

The clear modern doctrine is that, in order to constitute such negligence as will bar a recovery of damages, these two elements must in every case concur: (a) A want of ordinary care on the part of the plaintiff, or, where the action is for damages, resulting in death, a want of ordinary care on the part of the person killed; (b) a proximate connection between this want of ordinary care and the injury complained of. When this definition is kept in mind it will be seen that the rule as asserted in *Davies v. Mann*, i. e., of the last clear chance, is not in conflict with the rule asserted first in *Butterfield v. Forrester*, i. e., of contributory negligence, but that the rule of the former case is rather a just extension of the latter's underlying principles.

Nor is the doctrine of the last clear chance, an exception to the rule that contributory negligence bars a recovery, unless the injury is wanton or willfully inflicted. Its proper application does not permit an injured person to recover in spite of negligence on his part contributing to the injury but it does permit a recovery notwithstanding a want of due care on the part of the plaintiff, in cases where the facts are such that it may be said that the plaintiff's want of due care was not the proximate cause of the injury. Evidence to which this rule of law is applicable does not tend to prove that the injured party used due care, but it does tend to prove that such want of due care on the part of the plaintiff was not the proximate cause of the injury, and that the injury was caused solely by the failure of the defendant to take advantage of the last clear chance of avoiding the injury.[7] As tersely stated by one Court "it is simply a means of determining whether the plaintiff's negligence is a remote or a proximate cause of the injury."[8]

In the application of this doctrine, it must be borne in mind that it presupposes the existence and breach of a duty on the part of the defendant; and it cannot itself be properly invoked for the purpose of raising such a duty. The determination of the question as to whether any duty exists which has been violated, logically precedes any consideration of the applicability of the doctrine of last clear chance, and is of the nature of a condition precedent to the consideration of that doctrine. If for example, A trespasser on a railroad track is struck

(4) Law Quarterly Review p. 507.

(5) Pattersons Railway Accident Law, 55.

(6) Beach, Contrib. Neg., sec 28. See also Sherman & Redf. Neg., sec. 99; 66 Cent. L. J. 215; 79 Cent. L. J. 352.

(7) Smith v. Norfolk, etc., R. Co. 14 N. C. 728, 19 S. E. 863, 25 L. R. A. 287; Indianapolis Trac. etc. Co. v. Croly, 54 Ind. App. 566; Button v. Hudson River R. Co. 18 N. Y. 248; Nashua Iron. etc., Co. v. Worcester, etc., R. Co., 62 N. H. 159; Tanner v. Louisville, etc., R. Co., 60 Ala. 621.

(8) Smith v. Norfolk, etc., R. Co. 114 N. C 728, 25 L. R. A. 287, 19 S. E. 863.

by a train, and it appears that the employees in charge of the train did not see him, but that they might have seen him if they had kept a lookout, the question immediately arises whether the railroad company owed any duty to keep a lookout for trespassers.[9]

If under the decision of that state no such duty was incumbent upon the railroad company, and there was no other breach of of duty on its part, the question as to the applicability of the doctrine of last clear chance could not properly arise, for if the defendant was free from negligence then it would not be liable even if the plaintiff was entirely free from fault.[10]

When, however, a breach of duty on defendant's part, operating as a proximate cause of the injury, is established independently, and it further appears that plaintiff or deceased was guilty of antecedent negligence in getting into a position of peril, so that under the ordinary rule he would be chargeable with contributory negligence, the question arises whether he may be relieved of the operation of that general doctrine by the application of the doctrine of last clear chance; and it is not until this point is reached that the question whether the antecedent negligence of plaintiff or decedent continued until the instance of the impact is material.

The doctrine of last clear chance applies only to cases where the defendant's opportunity of preventing the injury by the exercise of due care, was later in point of time than that of the plaintiff. This is a rule of universal application and it affords the test of the applicability of the doctrine to a particular case. As a sort of corollary to this rule, the courts have stated as a general proposition, that, where the person injured has negligently exposed himself to the injury, he cannot recover on account of the negligence of the defendant by an application of this doctrine, unless it appears that the defendant's negligence intervened or continued after the negligence of the plaintiff had ceased.[11]

However, there is at least one class of cases in which it has been held that an injured person may recover by the application of the doctrine of last clear chance, notwithstanding his own negligence continues up to the very time of the injury. This class includes such cases as those involving railroad trespassers, where the engine driver or motorman actually possesses knowledge of the danger in which plaintiff is and has the power to prevent the accident and fails to take advantage thereof. In a recent Indiana case of this nature,[12] the Court instructed the jury that deceased was a trespasser on defendant's track and that they should find for the defendant unless they found that defendant's engineer discovered that the decedent was in a perilous position, and that he was unaware of such condition, and that such engineer made such discovery in time to have stopped or checked the train and avoided striking decedent. The instruction concluded as follows: "But, in case you find that said engineer, with ordinary care in the use of such means as were then at hand and under his control, and without endangering the train or the persons thereon, could have stopped said train, or checked the speed thereof so as to avoid striking said decedent then your verdict should be for the plaintiff." This instruction was objected to on the ground that it gave the jury to understand that the decedent was not obliged to use ordinary care, with which he is always chargeable in case of injury. In upholding the instruction the higher Court said: "As a general proposition, the statement of the law contended for by appellant is correct, but in the application of the doctrine of last clear chance the existence of the negligence of the party injured or his failure to exercise

(9) See note to Frye v. St. Louis, I. M. & S. R. Co., 8 L. R. A. (N. S.) 1069.

(10) See note to Southern R. Co. v. Bailey, 27 L. R. A. (NS) pg. 381.

(11) Indianapolis Traction, etc., Co. v. Croly, 54 Ind. App., pg. 582.

(12) Pennsylvania Co. v. Reesor, (Ind. App.) 108 N. E. 983.

due care will not, in all cases, defeat a recovery. Although he failed to exercise due care, which continued up to the moment of his injury, if the evidence discloses that the engineer in charge of this train, applying the principle to this case, realized the danger of decedent, and knew that he was unconscious of his danger, and, so knowing and realizing failed to exercise ordinary care to avoid the injury, appellee (plaintiff) is entitled to recover."[13]

It has been urged, however, that the recovery allowed in such cases is not based on the doctrine of last clear chance but rather on the ground of a wanton and willful injury to which the decedent's negligence would be no defence. But a California Court thus disposes of the objection: "It is immaterial whether the liability of the defendant in such a case be based upon the theory that the negligence of the defendant, being the later negligence, is the sole proximate cause of the injury, or upon the theory that defendant has been guilty of wilful and wanton negligence. In either case, the liability would exist, for, where an act is done willfully and wantonly, contributory negligence on the part of the injured person is no bar to a recovery."[14]

However, an examination of the cases will illustrate the narrowness from a practical point of view, of the distinction between the doctrine of last clear chance and the rule that contributory negligence will not bar a recovery for a wanton and willful injury.[15]

(13) The Court cites the following Indiana cases in support of its contention: Indianapolis Traction, etc., Co. v. Croly, 54 Ind. App., 566, 96 N. E. 973, 98 N. E. 1091; Chicago, etc., Ry. Co. v. Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; Indianapolis Traction, etc., R. Co. v. Kidd, 167, Ind. 402, 79 N. E. 347, 7 L. R. A. (NS) 143, 10 Ann. Cas. 942.

(14) Harrington v. Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. 85. See also Esrey v. Southern Pac. R. Co., 103 Cal. 54, 37 Pac. 500; Herbert v. Southern Pac. R. Co., 121 Cal. 227, 53 Pac. 651; Everett v. Los Angeles, etc., R. Co., 115 Cal. 105, 125, 34 L. R. A. 350, 43 Pac. 207, 46 Pac. 889.

(15) See Neary v. Northern P. R. Co., 37 Mont. 461; 97 Pac. 944, 19 L. R. A. (N. S.) 446.

A class of cases where there is often an attempt to invoke the doctrine of last clear chance, arise, from accidents to pedestrians while crossing street car tracks. In many of these cases, it appears that the plaintiff without observing his surroundings, negligently goes upon the track or in such close proximity to it as to expose himself to the danger of injury from a passing car, and where there is nothing to prevent him from observing his danger and avoiding the accident at any time before it occurs, and where it also appears that the motorman, by reason of his negligence, did not see the plaintiff or his danger in time to avoid the injury. In discussing cases of this nature an Indiana Court said:[16] "In such a case, the negligence of the plaintiff is concurrent and not antecedent and the reason upon which the general rule is based cannot apply. If the want of care on the part of the plaintiff consists in a failure to discover his own danger, and if the want of care on the part of the defendant consists of a like failure to observe the dangerous situation of the plaintiff, and if such want of due care on the part of both continues until the injury occurs, or becomes so imminent that neither can prevent it, the plaintiff can not recover. Under such circumstances, the opportunity of the plaintiff to observe the danger is equal to that of the defendant, and the duty to discover the danger and avoid the injury by the exercise of due care rests equally upon him and the defendant. If the opportunity of the plaintiff to avoid the injury was as late as that of the defendant, how can it be said that the defendant had the last clear chance of avoiding it? The test is, what wrongful conduct occasioning the injury was in operation at the very moment it occurred, or became inevitable? If just before the climax, only one party had the power to prevent the injury, and he neglected to make use of it, the responsibilty is his alone, but if each had the

(16) Indianapolis Traction, etc., Co. v. Croly, 54 Ind. App. 560.

power to avoid said injury, and each failed to use it, then their negligence is concurrent, and neither can recover. In such a case, the negligence of the motorman in failing to keep a lookout in front of his car is the violation of the general duty which he owes to all persons making use of the street. He does not owe to the person negligently exposed to injury any special duty different from that owing to other travelers in the street, for the reason that he does not know prior to the injury that the situation of such person is such as to expose him to a particular danger. Such failure of the motorman to perform a general duty of this character is negligence, to which contributory negligence is a defence."[17]

A different question, however, arises in the exceptional case, when, by reason of intervening circumstances the original negligence of the plaintiff in getting into a position of peril is regarded as having culminated and ceased while it was still possible for defendant, by the exercise of due care, to have discovered the peril and averted the accident. In such cases, i. e., when the negligence of the defendant, in failing to discover the danger, continued as an efficient cause of the accident after the antecedent negligence of the plaintiff must be deemed to have ceased—the decided tendency, though there is a conflict on the subject, is toward the view that the failure of defendant to discover the danger is sufficient to sustain the doctrine, and that the actual discovery of the danger is not necessary, if, under the circumstances, there was a duty incumbent upon the defendant to discover the danger and the perfomance of that duty would have enabled the defendant to avert the accident.[18]

It is very difficult in cases where the entire transaction covers but a very brief period to determine whether the defendant's negligence continued or intervened after the negligence of the plaintiff had culminated. This difficulty is well illustrated in a New York case[19] where the Court, divided four against three, and held that evidence tending to show that a stret car might have been stopped within eight feet after it first struck a wagon crossing the track, but that it did not stop until it had shoved the wagon for at least 20 feet, the wagon being tipped over and the decedent thrown therefrom and killed, did not justify the submission of the case to the jury under the doctrine of last clear chance. The majority of the Court seems to have decided that it was impossible to attempt to divide such a transaction into fragments and impute one part of it to the negligence of both parties, and another part of the defendant's negligence alone. The dissenting judges took the view that a recovery should be had, basing their argument on the "humanitarian" doctrine. Justice Vann, who delivered the dissenting opinion said: "Can we say, as matter of law, that the motorman was justified in not stopping the car, when a human life was in such imminent peril and he could have stopped it in time to prevent the fatal result. Such a rule would be a reproach to jurisprudence and an encouragement to reckless conduct. As I understand it, our law is not subject to this imputation; but, on the other hand, the humane rule is in force that, notwithstanding, the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the

(17) As bearing on this question see Dyerson v. Union Pac. R. Co., 74 Kas. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132; French v. Grand Trunk, etc., R. Co., 76 Vt. 441, 58 Atl. 722; Butler v. Rockland, etc., R. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. 267; Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 76 Pac. 719; 101 Am. St.: 68; See note to Bogan v. Carolina C. R. Co., 55 L. R. A. 418 and footnote in Hammers v. Colorado Southern, N. O. & P. R. Co., 34 L. R. A. (N. S.) 685 and note to Bourrett v. Chicago & N. W. R. Co. (Iowa), 132 N. W. 973, 36 L. R. A. (N. S.) 957.

(18) Ferguson v. Chicago, M. & St. P. R. Co., 100 Iowa 741, 69 N. W. 1028; See cases cited in decision in Bourrett v. Chicago & N. W. R. Co. (Iowa), 36 L. R. A. (N. S.) 957 and in note. See Teakle v. San Pedro, L. A. & S. L. R. Co. (Utah), 90 Pac. 409, 10 L. R. A. (N. S.) 486 and cases cited on question of actual discovery of peril not being necessary.

(19) Rider v. Syracuse Rapid Transit Co., 171 N. Y. 139, 58 L. R. A. 125; 63 N. E. 836.

exercise of reasonable care and prudence, an action will be for the jury."

It would seem to be well settled that the plaintiff or decedent must have been in a situation of apparent and imminent danger for some appreciable time before the injury. In cases where the evidence is in conflict upon this point, or in cases where the undisputed evidence upon this question is of such a character that reasonable minds might draw opposite inferences, the question should be submitted to the jury under proper instructions from the Court.[20]

Although it would be impossible to formulate rules that would cover all the state of facts that might arise, yet the following propositions might be stated for the guidance of the practitioner who wishes to know whether a case will come under the doctrine of the last clear chance.

1. Defendant must have owed plaintiff a special and particular duty, the violation of which can be treated as the sole proximate cause of the injury.
2. Such duty must arise some appreciable time before the injury occurs.
3. Defendant's opportunity of preventing the injury by the exercise of due care must be later in point of time than that of plaintiff.
4. If the negligence of both plaintiff and defendant are concurrent and continue up to the time of the accident, there can be no recovery under this doctrine unless defendant, prior to the time of the injury, saw and realized the danger of plaintiff and could have prevented it by the exercise of due care. The danger being unknown to plaintiff.[21]

SUMNER KENNER.

Huntington, Indiana.

(20) Wabash R. Co. v. Tippecanoe Loan & T. Co. (Ind. Supp.), 98 N. E. 64, 38 L. R. A. (N. S.) 1167 and note; Evansville, etc., Traction Co. v. Spiegel, 49 Ind. App. 412, 94 N. E. 718, 97 N. E. 949; note to Dyerson v. Union P. R. Co., 7 L. R. A. (N. S.) 133.

(21) A full review of the many cases coming under this doctrine can be had by a study of the following cases with their exhaustive notes: Bogan v. Carolina C. R. Co., 55 L. R. A. 418; Dyerson v. Union Pac. R. Co., 7 L. R. A. (N. S.) 132 and note; Neary v. Northern P. R. Co., 37 Mont. 461, 19 L. R. A. (N. S.) 446; Hammers v. Colorado Southern, N. O. & P. R. Co., 34 L. R. A. (N. S.) 685; Bourrett v. Chicago and N. W. R. Co., 36 L. R. A. (N. S.) 957; Teakle v. San Pedro, L. A. & S. L. R. Co., 10 L. R. A. (N S.) 486.

EVIDENCE—WITHDRAWAL OF PLEA OF GUILTY.

STATE v. CARTA.

Supreme Court of Errors of Connecticut. Jan. 13, 1916.

96 Atl. 411.

Where accused entered a plea of guilty, and thereafter withdrew it, on trial for the offense the plea was admissible as an extrajudicial confession, inconsistent with the claim of innocence urged on the subsequent trial, not conclusive, but requiring further proof to establish the corpus delicti in order to justify a conviction.

THAYER, J. * * * [2] The ground of error most insisted upon in the case is that which relates to the court's action in permitting the state, against the defendant's objection, to prove from the record in the case that the accused had previously in the superior court entered a plea of guilty to the same information upon which he was being tried, but had withdrawn that plea by leave of court and entered a plea of not guilty. The defendant objected to the admission of this testimony upon the ground that it was not proper to go before the jury, claiming that the plea of guilty had been entered by reason of a misunderstanding between his attorney and the state's attorney, and also upon the ground that it was immaterial to the issue and injurious to his rights. The objection was overruled, and the evidence admitted.

[3] The record shows that the case was tried to the jury at the same term to which the information was brought, so that the leave to enter the plea of guilty and to withdraw it and to enter the plea of not guilty was given by the same judge who presided at the trial of the case. A court will not allow a party to enter a plea of guilty until it is satisfied that it is freely made and that the party making it understands its purport and effect; for the entry of such a plea is a conviction and the equivalent of a finding of guilty by a jury. State v. Willis, 71 Conn. 293, 308, 41 Atl. 820. When entered, such a plea cannot be withdrawn (in the absence of a statute permitting it), except by leave of court. It is within the court's discretion to permit it to be done.

[4] We suppose that the universal practice in this state has been for the court to exercise that discretion in favor of the accused and to permit him to change his plea and have a jury decide the question of his guilt. It does not appear from the record whether at the time the plea was withdrawn any hearing was had to

determine whether the plea of guilty was entered by reason of a misunderstanding between the attorney for the defendant and the state's attorney. If there was none, the parties to the misunderstanding were officers of the court, were before the court at the time the evidence was objected to, and it must be presumed that, if the court was not already familiar with the circumstances under which the plea was entered and leave obtained to withdraw it, it at once made itself familiar with them and ascertained whether the plea was, in fact, entered by reason of any misunderstanding which in any way affected the defendant's action in making the confession. The court will be presumed to have done its duty in the first instance and to have satisfied itself that the plea of confession was made voluntarily and without mistake on the part of the accused before ordering such plea to be entered.

[5] The fact that the plea was accepted is prima facie proof that the confession was voluntary, and, as before stated, if not withdrawn, is conclusive of the guilt of the accused. Where, as in this case, the plea had been withdrawn, it was not conclusive, and it was open to the accused to show, if he could, that the plea was mistakenly entered.

[6] It is apparent from the record that the state offered the proof that the defendant entered the plea of guilty, and afterward withdrew it, not as proof of a judicial confession which would be conclusive upon the defendant, but as showing conduct on the part of defendant which was inconsistent with his claim of innocence before the jury. It was manifestly so regarded and treated by the defendant's attorney and by the court. The state proved not only the fact that the plea was entered, but that it had been withdrawn, showing that the proof was not offered as showing the conviction of the accused by his own plea; and the objection to it was not that a judicial confession so given in the trial court was not admissible under any circumstances, but that it was entered through a misunderstanding. It was thus by all parties treated as an extrajudicial confession or admission. Such an admission or confession is not conclusive, and, unless further proof to establish the corpus delicti is offered, is not sufficient to justify a conviction. State v. Willis, 71 Conn. 293, 308, 41 Atl. 820. It appears from the record that such further proof was offered by the state in the present case. When the fact was established that the admission had been made by the accused, the admission was not before the jury as testimony by the accused establishing the truth of all or any of the allegations of the information, but the fact that he had made it, had pleaded guilty, was before them, and was relevant, as being inconsistent with his claim to the jury that he stabbed Bartolotta in self-defense and was not guilty.

The defendant made no claim in the superior court, nor on his appeal here, that the fact that a plea of guilty had been entered and withdrawn in the trial court could not be proved in any case against the accused. But we have been referred to some authorities which hold that a plea of guilty which the court refused to accept, or which had been entered, and afterward withdrawn, and a plea of not guilty entered, is not admissible against the accused. In People v. Ryan, 82 Cal. 617, 23 Pac. 121, a plea of guilty was entered and afterward withdrawn, a statute giving the accused the right to withdraw such a plea before sentence. It was held error for the trial court to permit a plea of guilty to be given in evidence upon the trial to the jury upon the plea of not guilty subsequently entered. It does not appear in the report of the case that the evidence was offered to establish a judicial confession, but it appears that no conviction could have been obtained without it, and the court speaks of it as a confession. In State v. Meyers, 99 Mo. 117, 12 S. W. 516, the court had refused to accept a plea of guilty, but afterward permitted the state to prove that the accused at first pleaded guilty to the charge upon which he was on trial. This was held to be error, the court saying that the trial court properly refused to accept the plea, and that the plea "should never have been heard of again." In the case the court treats the plea of guilty, when proved, as conclusive evidence of the defendant's guilt. He says:

"By refusing to receive the plea and granting the defendant a trial, this of necessity meant a trial with the issues of fact to be determined by a jury, and not to be determined by the previous plea of the defendant which admitted all that the state desired to prove."

The court thus treats the evidence as received as a judicial confession of the accused, and so conclusive upon him. Wharton, in his Criminal Evidence (10th Ed.) vol. 2, pp. 1326, 1327, says that, where a plea of guilty has been withdrawn, it is not binding upon the accused, and cannot be used in evidence against him. In a case in Kentucky (Commonwealth v. Ervine, 8 Dana [38 Ky.] 30) a sentence upon a plea of guilty had been reversed, and upon a trial thereafter had upon a plea of not guilty entered without objection by the common-

wealth the former plea of guilty was introduced in evidence, and it was held that it was properly admitted, but was not conclusive of the defendant's guilt. Where an accused person has pleaded guilty in a justice or other inferior court, and has taken an appeal or been bound over to a higher court, he is there always permitted to plead anew, and it has always been the rule in this state that upon the trial there the fact that he pleaded guilty in the lower court may be put in evidence either by the record or by testimony of witnesses who were present and heard the accused when he entered the plea. This is not conclusive upon the accused, and is insufficient to warrant a conviction without other evidence to prove the corpus delicti. This is the rule in a majority of the other states, although some have held that the confession in the lower court is a judicial confession and sufficient without independent evidence of the corpus delicti to warrant a conviction. It would seem that the same principle which admits the admission or confession of the accused in the lower court to be introduced against him in the upper court should admit, with the same consequences, his confession by a plea of guilty, afterward withdrawn, in the upper court. The plea of guilty, as was said in State v. Willis, 71 Conn. 293, 41 Atl. 820, "is conviction" until the plea is withdrawn. The withdrawal of the plea withdraws the evidence of conviction, but it does not withdraw the fact that such a plea was entered. It is as competent to give evidence of that fact as to give evidence that a similar fact occurred in the justice or magistrate's court. Neither is conclusive upon the accused. The evidence in each case establishes a fact which is inconsistent with his later claim before the jury that he is innocent. Had the accused in the present case, called as a witness in his own behalf, testified that, being stabbed by Bartolotta, he pursued him in the heat of passion and stabbed him intending to kill him, and later, upon leave to change his testimony, had testified that he only pursued his assailant for a few steps, when the latter turned upon him, and he killed him in self-defense, the fact that he first gave evidence corroborating the state's claim of guilty would be a fair matter of comment for the state's attorney in his argument to the jury and a proper matter for the jury to consider in determining the weight to be given to the defendant's claim. For the same reason the defendant's conduct in pleading guilty and later changing his plea was a proper matter to be brought to the jury's attention by the evidence objected to. We do not understand that the cases referred to and a few others of like import which may be found are in conflict with this view. They seem to be decided upon the view that the evidence was offered and received as evidence of a judicial confession which was conclusive of the defendant's guilt. And Wharton, in the paragraph to which we have referred, is speaking of judicial confessions, and we understand the paragraph to go no further than to say that, when such confessions by plea of guilty have been withdrawn, they are no longer conclusive against the accused, and cannot be used in evidence as judicial confessions against him. However that may be, we are of the opinion that the fact that a plea of guilty was entered and afterward withdrawn may be given in evidence against an accused for the purposes which we have indicated, and for which it is manifest such fact was offered and received in the present case.

There is no error.

In this opinion BEACH and GREEN, JJ., concurred.

NOTE.—*Evidence in a Trial of a Plea of Guilty That Has Been Withdrawn.*—The ruling in the instant case appears to me both unfair and contrary to law. It is unfair, because a defendant is constrained to allow plea to stand, if the fact of its having once been entered may be shown upon its being withdrawn. It is contrary to law because it was first offered in the hope of benefit to accrue and therefore it cannot be considered voluntary. The fact that benefit is hoped for is something like an irrebuttable presumption of law—it is impossible to show that a deliberate act like the interposing of a plea of guilty does not have its rise in the hope of leniency or some other benefit. A defendant interposes it because he prefers to submit his case to the court or he wishes to suppress facts that would come out in a trial before a jury which might implicate third parties or furnish clues in regard to himself in other transactions.

In Wharton on Cr. Evidence, § 638, it is laid down that: "Where a plea of guilty is withdrawn by permission of the court, it is not binding as a confession, nor can it be used as evidence." In 2 Encyc. of Pl. and Pr., p. 229, it is stated that: "The effect of withdrawing a plea is to render it *functus officio*, and it cannot afterwards be given in evidence against the accused." In 8 Ruling Case Law, § 78, it is said: "It is hardly necessary to state that when a plea of guilty has been withdrawn and a plea of not guilty entered, the plea of guilty is not admissible in evidence against the accused."

In People v. Ryan, 82 Cal. 617, 23 Pac. 121, the court said: "We do not think that the legislature in passing the law which the defendant was allowed to nullify and render *functus officio* his plea of guilty by substituting or putting in place of it a plea of not guilty, intended to say that, notwithstanding such substitution and doing away with the first plea, it may be given in evidence

and sometimes serve as the only conclusive proof of a man's guilt under the plea of not guilty."

In State v. Curtis, 28 N. C. 247, it was ruled in a case where the plea of guilty was stricken out that: "The case now stands as if no trial had ever been had."

In State v. Meyers, 99 Mo. 107, 12 S. W. 516, the court refused to accept a plea of guilty and the prosecutor was allowed to show that upon the indictment being read accused pleaded guilty thereto. The court said: "Such testimony should not have been admitted. * * * By refusing to receive the plea and granting the defendant a trial, that of necessity meant a trial with the issues of fact to be determined * * * by the previous plea of the defendant which admitted all that the state desired to prove. In short, the trial court could not refuse to receive the defendant's plea of guilty at one time, and then use it against him at another." It seems to me it would be a great deal worse to use a withdrawn plea of guilty against an accused than to use one that he still is wishing to interpose.

In People v. Jacobs, 151 N. Y. Supp. 522, 165 App. Div. 721, it was ruled that: "There was no error in receiving testimony of a prior plea of guilty. Defendants had so pleaded, although thereafter, on their motion, the county judge had reversed this judgment and given them a new trial. The voluntary plea of guilty at the prior hearing was an admission of the failure to take out a license, which with the other evidence was properly left to the consideration of the jury." No authority whatever is cited to the ruling, but it is seen it is not stated that this plea had ever been withdrawn and another plea of not guilty had taken its place. And also it may have been in the mind of the court, that this was a different hearing and this made a difference.

This case was in a lower New York court and it does not appear to be consistent with a New York Court of Appeals ruling in a case where there was first a plea of not guilty to murder in the first degree and later a plea of murder in the second degree, which was accepted, but afterwards his plea was withdrawn by leave of the court and defendant on trial was convicted of murder in the first degree. It was claimed that the acceptance of the plea of guilty of murder in the second degree prevented conviction, after it was withdrawn of murder in a higher degree, but this contention was overruled. The withdrawal "left the case without any plea whatever until the defendant again interposed her general plea of not guilty to the whole indictment." In other words, the case was as if only the last plea had been entered.

The distinction in the contention I make appears in the rule that a former plea of guilty is admissible where made in another trial for a different offense. Com. v. Ayers, 115 Mass. 137; Com. v. Hazeltine, 108 Mass. 479. In such case it is taken as admission of facts embraced in a plea that has not been substituted by another plea. Where an accused has the benefit accorded to him of his plea of guilty, he should be held to the onus put upon him. But this is different from making him bear a burden from which he derived no benefit whatever and which only was assumed under some expectation of benefit. In addition to this, however, it looks like trickery in the law for a court to expunge from the record something that can have existence in no other way, and then to give force to what has been expunged.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1916—WHEN AND WHERE TO BE HELD.

American—Chicago, Ill., August 30, 31 and September 1.

Alabama—Decatur, July 14 and 15.

Illinois—Chicago, at Hotel LaSalle, June 1, 2 and 3.

Kentucky—Louisville, July 6 and 7.

Louisiana—Opelousas, May 5 and 6.

Michigan—Battle Creek, June 30, and July 1.

Mississippi—Laurel, May 2.

Ohio—July 11, 12 and 13. Place not fixed.

South Carolina—Charleston, latter part of June.

HUMOR OF THE LAW.

A negro woman in Denver went to the polls to register on the appointed day and after giving her name and address the clerk said:

"With which party are you affiliated?"

"Suh?"

"With which party are you affiliated?" he repeated.

"Is Ah got to tell you whut pahty Ah is 'filiated with?"

"You certainly have, if you vote."

"Well, jes scratch mah name off dat list, 'cause the pahty Ah is filiated with ain't got his divo'ce yet and I sho' ain't goin' tell no white man who he is."—St. Louis Globe-Democrat.

The small boy had applied at the lawyer's office for a job, and the lawyer, kindly man, was asking him a few preliminary questions of a moral character.

"Now, my boy," he said, after several interrogatories, "do you know what will become of you if you tell lies?"

"Yes, sir," replied the boy promptly.

"Good for you," said the pleased attorney. "Now tell me what."

"I'll be a great lawyer when I grow up; mother said I would!" And the gentleman collapsed.

An Arkansas man accused of murder was assigned by the court to conduct his defense a kid attorney. When asked if he had anything to say why sentence should not be passed upon him, he replied:

"Well, judge, I hope you will take into consideration the youth and inexperience of my lawyer."

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1. **Abatement and Revival**—Pleadings.—The defense that the plaintiff is a fictitious person attacks the capacity of the plaintiff to commence or continue the suit, and is properly the subject of a plea in abatement.—Baldauf v. Nathan Russell, N. J., 96 Atl. 96.

2. **Accord and Satisfaction**—Check in Full.—Act of agent of insurance company in sending the company a check, marked as payment in full to a certain date, held not an accord and satisfaction of their disputed account.—Factors' Fire Ins. Co. v. Whilden, N. Y., Supp., 156 N. Y. S. 362.

3. **Action**—Merger.—Under Rev. St. 1909, § 1795, attorney's services performed under two separate contracts of employment, one with an individual, and one with a company, would become a separate and distinct cause of action which could not be merged into one against both employers nor united in the same action.—Rounds v. Strang, Mo. App., 180 S. W. 1069.

4. **Adverse Possession**—Claim of Right.—A naked possession of land unaccompanied by a claim of right cannot constitute a bar to the true owner, but, in the absence of statutory requirement, the bona fides of the occupant's claim is not essential.—Ramapo Mfg. Co. v. Mapes, N. Y., 110 N. E. 772, 216 N. Y. 362.

5.——Statutes of Limitation.—Since a corporation may recover land on record title acquired by ultra vires act, no reason can be advanced why it cannot do so on a title by limitation so acquired.—Buchanan v. Houston & T. C. R. Co., Tex. Civ. App., 180 S. W. 625.

6. **Alteration of Instruments**—Materiality.—Where executed notes left with two makers for delivery, where materially altered without knowledge or consent of the other makers by indorsing a fictitious credit thereon, pursuant to a secret agreement, such alteration avoided the notes as to the makers not participating in the alteration.—Voris v. Birdsall, Okl., 153 Pac. 673.

7. **Assignments**—Inheritance.—A deed purporting to convey the "present rights in and title to, and all interest that" the grantor has or may become possessed of by inheritance or deed from his mother, then living, held void.—Dailey v. Springfield, Ga., 87 S. E. 479.

8. **Attorney and Client**—Disbarment.—Where the course of conduct of an attorney shows that he is unfit to remain a member of an honorable profession, although the charges, taken separately, might not require disbarment, he should be disbarred.—In re Montegriffo, N. Y. Supp., 156 N. Y. S. 512.

9.——Disbarment.—In disbarment proceedings against an attorney, evidence that he had sought to have the appellate court pass upon a fictitious controversy, for the purpose of obtaining an adjudication as to the validity of the Torrens Act, held to require suspension.—In re Hawes, N. Y. Supp., 156 N. Y. S. 283.

10.——Lien for Services.—An attorney having no lien prior to judgment, the cause of action may be compromised without his consent, and the adverse party is not liable unless guilty of fraud.—Campbell's Automatic Safety Gas Burner Co. v. Hammer, Or., 153 Pac. 475.

11.——Professional Misconduct. — Attorney, preparing answer and causing his client to verify it, containing a general denial of the material allegations of complaint which he knew to be true, and filing it solely for delay, held guilty of professional misconduct and severely censured.—In re Schreiber, N. Y. Supp., 156 N. Y. S. 398.

12.——Ratification.—Where defendant was present in the courtroom, presumably advising with his counsel, he thereby ratified all his counsel had already done in his behalf regardless of whether such counsel had been authorized prior thereto to represent him.—Young v. Martin, Kan., 153 Pac. 542.

13. **Bankruptcy**—Concealment.—The answer of opposing creditors in involuntary bankruptcy for written admission of inability to pay held not to sufficiently aver fraud and collusion between the debtor and petitioning creditors, of which the proceedings were the result, but at most concealment of goods and preferences.—In re Cohn, U. S. C. C. A., 227 Fed 843.

14.——Evidence.—Schedules and discharge in bankruptcy held prima facie evidence of what they purported to show including notice to creditors of creditors' meeting, especially in view of Bankruptcy Act, § 39, subd. 4.—Claflin v. Wolff, N. J., 96 Atl. 73.

15.——Fraudulent Transfer.—The trustee in bankruptcy of a debtor is vested with the right of action of creditors with respect to property fraudulently transferred by the bankrupt, and may, on their behalf, assail such transfers to the same extent as though the debtor had not been declared bankrupt.—Beasley v. Smith, Ga., 87 S. E. 293.

16.——Insolvency.—Insolvency of persons against whom liens specified in Bankr. Act, § 67f, are obtained, held indispensable to their avoidance under that section, and to the jurisdiction of the court of bankruptcy to order conveyance or make other orders to that effect thereunder.—Stone-Ordean-Wells Co. v. Mark, U. S. C. C. A., 227 Fed. 975.

17.——Judgment Appealed from.—Judgment against defendant and his sureties on appeal from justice court judgment, rendered prior to bankruptcy, held not void though pending appeal defendant was adjudged a bankrupt, the bankruptcy court having authorized plaintiff to proceed to judgment.—Kohn, Weil & Co. v. Weinberg, Miss., 70 So. 353.

18.——Judgment Creditor.—Under the Bankruptcy Act, as amended by Act, July 25, 1910, the trustee in bankruptcy attacking a sheriff's sale under a chattel mortgage, as in fraud of creditors, stands with all the rights and powers of a judgment creditor holding an execution duly returned unsatisfied.—Bean v. Parker, Vt., 96 Atl. 17.

19.——Notice.—Knowledge by a grantee of facts sufficient to put a reasonably prudent man on inquiry which, if pursued, would lead to a knowledge of the bankrupt grantor's insolvency at date of the conveyance, charges him with knowledge of such insolvency.—First Bank of Maysville v. Alexander, Okl., 153 Pac. 646.

20.——Preference.—Payments of notes to a bank, made by a bankrupt within four months prior to bankruptcy, by checks drawn on its

ordinary deposit account in such bank, held not to constitute voidable preferences.—American Bank & Trust Co. v. Coppard, U. S. C. C. A., 227 Fed. 597.

21.——Proof of Claim.—A secured creditor, who retained his security, held not entitled to prove a claim against the estate after the year for proving claims had expired.—In re Thompson, U. S. C. C. A., 227 Fed. 981.

22.——Schedules.—Though bankrupt did not mention in his schedules his assignment of life policies, yet, he supposing he had a right to assign, the trustee is not entitled to the whole amount of insurance, bankrupt having died, as concealed property and its increment.—In re Levy, U. S. D. C., 227 Fed. 1011.

23. **Banks and Banking**—Dividend.—Where the record of the vote by which a stock dividend was declared recited that it was from the surplus earnings of the bank, it will be presumed it was declared from surplus earnings available for distribution among stockholders.—In re Heaton's Estate, Vt., 96 Atl. 21.

24.——Federal Reserve Board.—Federal Reserve Act Dec. 23, 1913, § 11k, empowering Federal Reserve Board to grant to national banks applying therefor the right to act as trustee, executor, etc., held not within power of Congress, as such functions belong exclusively to the states.—People v. Brady, Ill., 110 N. E. 864.

25.——Interest.—The term "discounted," within Comp. Laws 1913, § 5166, authorizing banking associations to deduct interest in advance, has a more comprehensive meaning than the mere purchase of negotiable paper at a discount and covers loan transactions as well.—Sundahl v. First State Bank of Edmunds, N. D., 155 N. W. 794.

26.——Ultra Vires.—Banks, which with a natural person formed a firm to deal in cotton, were liable to such person for his share of profits, or, if he were an agent, for any compensation due him, though the formation of the firm was ultra vires as to them.—Dexter v. First Guaranty State Bank, Tex. Civ. App., 180 S. W. 1172.

27. **Bills and Notes**—Direction of Verdict.—Where the introduction in evidence of the notes sued on established prima facie that they were given for a valuable consideration, it was error to direct a verdict for defendant, though all the witnesses gave testimony tending to show invalidity of the notes.—McCormack v. Williams, N. J., 95 Atl. 978.

28. **Carriers of Goods**—Bill of Lading.—The words in a bill of lading "notify V. at S." do not indicate to the carrier that V. is the consignee; it appearing in the line above that the goods were consigned to P.—New York, N. H. & H. R. Co. v. Sampson, Mass., 110 N. E. 964.

29. **Carriers of Passengers**—Care.—A railroad common carrier is not bound to prevent its doors, which have been opened by others, from closing when its train is in motion, and it commonly has no reason to expect passengers to be standing on the platform.—Shaughnessy v. Boston & M. R. R., Mass., 110 N. E. 962.

30.——Exemplary Damages.—Where a carrier carries a passenger beyond his destination through reckless, careless, wanton, and willful neglect, but not otherwise, the passenger may recover exemplary damages in addition to actual damages.—St. Louis & S. F. R. Co. v. Lilly, Okl., 153 Pac. 810.

31.——Passengers Defined.—Ordinarily, every person not an employe being carried by the express or implied consent of the carrier on a conveyance usually employed in the carriage of passengers, is presumed to be lawfully upon it as a "passenger."—Georgia & F. Ry. Co. v. Tapley, Ga., 87 S. E. 473.

32.——Sudden Starting.—The starting of a street car without any sudden jerk was not negligence as to a passenger standing on the rear platform, holding to the handrail, but would be negligence as to a passenger who had placed one foot on the platform and was raising the other foot to the platform.—Bennett v. Metropolitan St. Ry. Co., Mo. App., 180 S. W. 1050.

33. **Commerce**—Employment.—The engineer of a train engaged in hauling gravel for the repair and improvement of his employer's roadbed over which interstate commerce regularly passed was engaged in interstate commerce, so that for his injury from a collision he might maintain an action under the federal Employers' Liability Act.—Holmberg v. Lake Shore & M. S. Ry. Co., Mich., 155 N. W. 504.

34.——Intoxicating Liquor.—Under the Webb-Kenyon Act, intoxicating liquors, brought from another state and intended to be used in violation of the law of Kansas, are not articles of interstate commerce.—Kansas City Breweries Co. v. Kansas City, Kan., 153 Pac. 523.

35.——Intoxicating Liquor.—Webb-Kenyon Law, divesting intoxicating liquors of their interstate character in so far as power of the state to regulate the sale and disposition thereof and the shipment into the state for that purpose is concerned, is valid.—Gottstein v. Lister, Wash., 153 Pac. 595.

36.——Migratory Birds.—Congress cannot prescribe regulations to protect migratory game birds within the boundaries of a state.—State v. McCullagh, Kan., 153 Pac. 557.

37.——Prize Fight Films.—Act July 31, 1912, § 1, making it unlawful to bring into the United States any film of any prize fight for purposes of public exhibition, is not beyond the powers of Congress under the commerce clause of the federal Constitution.—Weber v. Freed, U. S. Sup. Ct., 36 S. Ct., 131.

38.——Safety Appliance.—Car in interstate train marked for repairs and to be switched to repair track was not withdrawn from interstate commerce so as to relieve carrier from liability for injuries to a switch foreman under the Safety Appliance Acts and the Employers' Liability Act.—Great Northern Ry. Co. v. Otos, U. S. Sup. Ct., 36 S. Ct. 124.

39. **Constitutional Law**—Delegation of Power.—While a legislative body cannot delegate its powers, it may delegate to a board, as a railroad commission, the right to determine question of fact such as whether a railroad falls within a given class for purpose of license taxes under Laws 1912, c. 102.—New Orleans M. & C. R. Co. v. State, Miss., 70 So. 355.

40.——Discrimination.—A person not belonging to a class alleged to have been unlawfully discriminated against by a statute cannot, in judicial proceedings, assail the constitutionality of the state, as it affects that class.—State v. Philips, Fla., 70 So. 367.

41.——Police Power.—The police power of the state is not limited to regulations necessary for the preservation of good order or the public health and safety, but extends to the prevention of fraud and deceit in the sale of articles of food.—People v. Dehn, Mich., 155 N. W. 744.

42.——Public Waters.—The state may without denying equal protection of the laws justly discriminate in favor of its citizens in regulating the taking for private use of the common property in fish and oysters found in the public waters of the state.—Ex parte Gillette, Fla., 70 So. 446.

43.——Remedy.—No person has a vested right in any particular mode of procedure or remedy.—American Nat. Ins. Co. v. Donahue, Okl., 153 Pac. 819.

44.——Workmen's Compensation Law.—Workmen's Compensation Act, modifying the common-law defense of contributory negligence, and abrogating the defenses of assumed risk and fellow servant's negligence, is not unconstitutional as denying equal protection of the laws.—Consumers' Lignite Co. v. Grant, Tex. Civ. App., 181 S. W. 202.

45. **Contracts**—Consideration.—Where the owner of a building agreed to pay subcontractors if they would continue and would not quit, they may recover the value of the work, though no terms of payment were agreed upon and no amount fixed.—Paul v. Haber, N. J., 96 Atl. 41.

46.——Duress.—As duress in executing a contract involves the state of mind of the complaining party, his age, sex, and condition of life, the character of the threats made, and attendant circumstances, are competent evidence.—Gate City Nat. Bank v. Elliott, Mo., 181 S. W. 25.

47.——Proposal and Acceptance.—Where plaintiff's offer to sell his share in a business

for his investment was not accepted in terms, but defendant replied that when capable he would pay what he thought plaintiff was entitled to, no binding contract was created.—Moss v. Granville, N. Y. Supp., 156 N. Y. S. 453.

48.——Third Person.—If promisee's obligation to a third party does not exist at time contract is made, or did not grow out of the contract, such third party cannot recover on the contract, as a beneficiary.—Dickinson v. McCoppin, Ark., 181 S. W. 151.

49. **Corporations** — Contracts. — Person contracting with corporators held to do so at his peril; and, they having no power to make the contract, there was no valid contract.—Taylor v. St. Louis Nat. Life Ins. Co., Mo., 181 S. W. 8.

50.——Foreign Corporation.—Where the greater portion of the business of a foreign corporation in the state was unauthorized by its license and therefore illegal, the company had no right of action against another publishing company for a libel which injured its business so done without authority of law.—Lewis Pub. Co. v. Rural Pub. Co., Mo., 181 S. W. 93.

51.——Stockholders.—An assessment against stockholders of an insolvent corporation is conclusive only as to insolvency and the amount of the assessment, and does not preclude the stockholders from subsequently making any other defense.—Finch, Van Slyck & McConville v. Le Sueur County Co-operative Creamery Co., Minn., 155 N. W. 754.

52. **Covenants**—Breach.—Where a purchaser sells to a second vendee before the conveyance is made, and by agreement of all parties a single deed containing a covenant against incumbrances is made by the first vendor to the second vendee, the covenantor is liable to the covenantee for breach of covenant.—Cox v. Stambaugh, Kan., 153 Pac. 513.

53. **Damages**—Evidence.—In a personal injury action, evidence that after the accident plaintiff was no longer able to run a switch engine, as he had been able to before, is admissible, notwithstanding that he was not an engineer at the time of the accident.—Texas & P. Ry. Co. v. Rasmussen, Tex. Civ. App., 181 S. W. 212.

54.——Measure of.—The measure of damages for breach of a contract to deliver a good note for the price of horses, the note delivered being of no value, was the amount written in the note and interest thereon.—Kuykendall v. Caldwell, Okl., 153 Pac. 874.

55.——Minority of Child.—Parents may recover the gross value of services lost during the minority of their child, without deducting anything on account of its support, together with reasonable compensation for nursing and medical treatment during sickness resulting from its injury.—Thomas v. St. Louis, I. M. & S. Ry. Co., Mo. App., 180 S. W. 1030.

56. **Deeds** — Misrepresentation. — Where the agent of a coal company by misrepresentations obtained from a landowner a quitclaim deed covering a tract he did not intend to convey, although he could read and write, he could rely on the misrepresentations in suit against him by the coal company for possession of the land covered by the deed.—Kentland Coal & Coke Co. v. Elswick, Ky., 181 S. W. 181.

57. **Easements** — Prescription. — Where one has used a private way for more than 30 years through another's improved lands, without gates or other obstructions, the erection of gates or fences across the way by another entitles the prescriber to enforce the removal of same.—Hill v. Miller, Ga., 87 S. E. 385.

58.——Prescription.—Though defendant maintained a private telephone line over plaintiff's land for two years, he did not acquire such an easement that, upon changing the location of the poles, he had a prescriptive right in the new way; nor, if he had showed an easement in the old way, could he assert the same right in the new, where there was no positive act of obstruction.—American Cement Plaster Co. v. Acme Cement Plaster Co., Tex. Civ. App., 181 S. W. 257.

59. **Election of Remedies** — Inconsistent Causes of Action.—An election between several inconsistent causes of action, if made with knowledge of the facts, cannot be withdrawn without due consent, though it has not been acted on by another by any change of position.—Flynn-Harris-Bullard Co. v. Hampton, Fla., 70 So. 385.

60. **Elections**—Registration.—In a prosecution for conspiracy in procuring fraudulent registration of voters, on a showing that the last registration day followed the fact testified to, evidence that defendant tried to secure a boat for that day to carry men to the place of registry was admissible.—Simond v. State, Md., 95 Atl. 1073.

61. **Eminent Domain**—Public Use.—The condemnation of defendant's land for a compensation reservoir to restore the flow of a river whose waters were to be taken to improve the water supply of a city, which restoration was made necessary by the opposition of riparian owners, was for a public use.—Board of Water Com'rs of City of Hartford v. Manchester, Conn., 96 Atl. 182.

62. **Fish**—Regulation of Taking.—The right of individuals to fish in the public waters of the state is subject to state regulation for the general welfare, which regulation may be of any character and extent that does not destroy the right.—Ex parte Powell, Fla., 70 So. 392.

63. **Frauds, Statute of**—Oral Contracts.—The statute of frauds is not intended to apply to written contracts, but only to the enforcement of oral contracts and to prevent the assertion of fictitious and fraudulent contractual obligations by requiring them to be reduced to writing, signed by the party to be charged, etc.—Truskett v. Rice Bros. Live Stock Commission Co., Mo. App., 180 S. W. 1048.

64. **Fraudulent Conveyances**—Unpaid Purchase Money.—Where a fraudulent grantee sells the property to an innocent purchaser, any unpaid purchase money due him will be impounded as an equitable asset of the debtor for distribution to his creditors.—Beasley v. Smith, Ga., 87 S. E. 293.

65. **Homicide**—Harmless Error.—That the jury found defendant guilty of manslaughter under evidence showing that the crime was murder did not entitle him to a reversal.—Lytton v. State, Okl. Cr. App., 153 Pac. 620.

66. **Insurance**—Tender.—Where the insured received money, which he alleged was a part payment, and the insurer alleged was full payment for a loss, he was not obliged, in suing on the policy, to make tender of the amount received, but it might be treated as a payment on account.—Rocci v. Massachusetts Accident Co., Mass., 110 N. E. 972.

67. **Judgment**—Res Judicata.—A decree of distribution made in winding up an estate is conclusive as to matters properly before the county court at the hearing but not as to the right to the possession of realty belonging to the estate, or the right of the surviving spouse to occupy the homestead.—Pennington v. Woodner-McGaugh, Okl., 153 Pac. 875.

68. **Jury**—Qualification.—While counsel may properly inquire whether a venireman is interested in an insurance company which was the real, though not the nominal, party in interest, the question as to whether the venireman was acquainted with such company may be excluded in the discretion of the court.—William R. Roach & Co. v. Blair, Mich., 155 N. W. 696.

69. **Landlord and Tenant**—Repairs.—The lessor of a building for business purposes is under no implied obligation to keep the leased premises in repairs and tenantable.—Jones v. S. H. Kress & Co., Okl., 153, Pac. 655.

70. **Libel and Slander**—Evidence.—Suits for libel and slander partake more or less of the nature of a criminal accusation, and the preponderance of proof required for making out plaintiff's case should be greater than in ordinary civil actions.—Sterkx v. Sterkx, La., 70 La. 428.

71.——Malice.—Where the editor and publisher of a newspaper were both sued for libel, and it did not appear that they had entered into a conspiracy, proof of actual malice on the part of one of them will not be imputed as to the other.—Egan v. Dotson, S. D., 155 N. W. 783.

72. **Malicious Prosecution**—Arresting Trespassers.—Defendant railroad was liable for the act of its superintendent, in entire charge of

its property, and of officers employed to arrest trespassers, in falsely arresting and maliciously prosecuting plaintiff for entering the company's toolhouse.—Cooper v. Southern R. Co., N. C., 87 S. E. 322.

73. **Mandamus**—Remedy at Law.—Mandamus to prevent an unlawful assessment of bank property for taxation, and the collection thereof, will not be entertained, since the statutes provide an adequate remedy.—National Loan & Exchange Bank of Greenwood v. Jones, S. C., 87 S. E. 482.

74. **Master and Servant**—Alternative Pleadings.—Petition, in action for wrongful death of car repairer, may be drawn in alternative, showing a cause of action under the federal Employers' Liability Act, § 9, as added in 1910, the state laws, or at common law, depending on development of facts on trial for cause to be relied upon.—San Antonio & A. P. Ry. Co. v. Littleton, Tex. Civ. App., 180 S. W. 1194.

75.——Burden of Proof.—Where the natural and reasonable inference is that the accident happened while the deceased servant was engaged in his employment, the master has the burden of proving the contrary.—Papinaw v. Grand Trunk Ry. Co. of Canada, Mich., 155 N. W. 545.

76.——Damages.—Where a servant suffered only partial loss of an eye, which did not impair his ability to work and resulted in no reduction of wages, he was not entitled to compensation for "loss of an eye," but only for partial loss, as measured by lessened earnings, under Workmen's Compensation Act, § 10.—Cline v. Studebaker Corporation, Mich., 155 N. W. 519.

77.——Dependent.—Wife who voluntarily left her husband, going to another state and resuming her old profession of school teacher, held not his "dependent" under Workmen's Compensation Act, pt. 2, §§ 6, 7.—Finn v. Detroit, Mt. C. & M. City Ry., Mich., 155 N. W. 721.

78.——Employment.—Where a contract of employment merely fixed a yearly rate, payments to be made in monthly installments, held, that the employer might terminate it during the year; the contract being one at will.—Thullen v. Triumph Electric Co., U. S. C. C. A., 227 Fed. 837.

79.——Intimidation.—While workmen may go on a strike and use legitimate means to induce other workmen to join them or refrain from taking their positions, they cannot intimidate, coerce, or terrorize such other employes.—Minnesota Stove Co. v. Cavanaugh, Minn., 155 N. W. 638.

80.——Joint Tort-Feasors.—Under Employers' Liability Act, § 5, every release of damages is invalid in an action by an employe against another railroad company seeking to escape on the ground that it was a joint tort-feasor and that such release would release all joint tort-feasors.—Chicago & A. R. Co. v. Wagner, U. S. Sup. Ct., 36 S. Ct. 135.

81.——Liability.—The liability of a railroad for death of its engineer killed by an explosion of an engine of its own design was not the same as if it had gone into the market and purchased a standard engine from a reliable manufacturer without knowledge of defects.—Kirby v. Chicago, R. I. & P. Ry. Co., Iowa, 155 N. W. 343.

82.——Pleading.—Permitting the declaration, in an action for the death of a railroad employe, to be amended more than two years after accrual of the cause of action, so as to bring the case within the federal Employers' Liability Act, held not error, though the declaration did not refer to such act, but counted on Pub. Acts 1909, No. 104, where the facts originally alleged showed that decedent was employed in interstate commerce.—Jorgenson v. Grand Rapids & I. Ry. Co., Mich., 155 N. W. 535.

83.——Vice Principal.—The foreman of a biscuit company, in directing a laborer to up-end a barrel of honey, and providing the place and appliances for the work, was a "vice principal," for whose negligence the company was liable; but in assisting in lifting the barrel he was a "fellow servant," for whose negligence it was not liable under Civ. Code, § 1449.—Wig v. Manchester Biscuit Co., S. D., 155 N. W. 772.

84.——Workmen's Compensation Act.—Where an employe sued for his injury within three months after the accident, and by an amended petition asked compensation under the Workmen's Compensation Act, held, that the action as first brought, though irregular, served the purpose of the statutory requirement that claim for compensation be made within three months.—Ackerson v. National Zinc Co., Kan., 153 Pac. 530.

85. **Mines and Minerals**—Lien.—Where the owner of a placer claim required one entering under option to purchase, to construct a dredge, it will, in a proceeding to affix a lien on the land on account of sums due on machinery for the dredge, be presumed that the mine was enhanced to the value of the dredge.—Colorado Gold Dredging Co. v. Stearns-Rogers Mfg. Co., Colo., 153 Pac. 765.

86.——Property Right.—The doctrine that the owner of lands has no property right in oil and gas beneath the surface until he has reduced it to possession does not deny, but concedes to him the exclusive right to use the surface to reduce the oil and gas to possession.—Strother v. Mangham, La., 70 So. 426.

87. **Mortgages**—Dower.—A grantee in an absolute deed intended as a mortgage has no such estate as can be sold under execution, and his widow, unlike the widow of the mortgagor, has no dower right, and upon his death the mortgage passes to his personal representative.—Williams v. Williams, Ill., 110 N. E. 876.

88. **Municipal Corporations**—Board of Equalization.—It must be assumed that valuations made by the county assessor and equalized by the board of equalization are approximately correct, and they may be used by the assessors of an improvement district as representing the value of all the property therein.—Board of Improvement, Waterworks Improvement Dist. No. 22 of Texarkana v. Southwestern Gas & Electric Co., Ark., 180 S. W. 764.

89.——Jitney Busses.—That an ordinance licensing and regulating the operation of jitney busses excluded from its operation railroad cars, street cars, automobiles used exclusively as sight-seeing cars, hotel busses, and taxicabs did not render it invalid, as being unlawfully discriminatory.—Thielke v. Albee, Or., 153 Pac. 793.

90.——Police Power.—The general rule, in the absence of special constitutional provision, is that all officers whose duties pertain to the exercise of the police power of the state are in that sense state officers, and under the control of the Legislature, even though they may be officers of a municipality and charged with the enforcement of the local police regulations of such municipality.—State v. Linn., Okl., 152 Pac. 826.

91.——Taxpayer.—A common-law action cannot be maintained by a citizen and taxpayer "for the use of" a city against city officers for money collected from plaintiff and other taxpayers and misappropriated by defendants; the right of recovery, if any, being in the city.—Young v. Moor, Ga., 87 S. E. 401.

92.——Vacating Streets.—The city of St. Louis, under its charter, empowering it to "open and vacate streets," was authorized to enact an ordinance vacating an alley.—Kingshighway Supply Co. v. Banner Iron Works, Mo., 181 S. W. 30.

93. **Navigable Waters**—Riparian Rights.—Where riparian owners placed fillings and buildings in the bed of a navigable river they created a purpresture, and were liable to judgment restraining them from continuing the trespass and authorizing removal of the obstructions, whether or not overflows dangerous to the public were caused.—Petty v. City of San Antonio, Tex. Civ. App., 181 S. W. 224.

94. **Negligence**—Turn-Table Cases.—The doctrine of the turn-table cases does not apply to a railroad company which had fenced off its right of way, and a child who slipped through a hole broken in the fence is a trespasser, though some of the railroad company's servants had knowledge of the hole.—Gulf, C. & S. F. Ry. Co. v. Moss, Tex. Civ. App., 180 S. W. 1128.

95. **Notice**—Prudent Inquiry.—Knowledge of facts relating to a matter which would naturally lead an honest and prudent person to make

inquiry concerning the rights of others constitutes notice of everything which such inquiry, pursued in good faith, would disclose.—Twitchell v. Nelson, Minn., 155 N. W. 621.

96. **Parent and Child**—Custody of Child.—A husband who procured a divorce without making any effort to obtain the custody of a minor child could not, by divesting himself of all his property, escape his obligation to support such child.—White v. White, Mo. App., 180 S. W. 1004.

97. **Partnership**—Action Against.—Where a partnership and the two persons composing it are sued, and each individual separately files a demurrer to the petition, which is overruled, they may except without joining the partnership as such in the bill of exceptions.—Higdon v. Bell, Ga., 87 S. E. 385.

98.——Test of.—The primary basis of a partnership is the intention of competent parties, manifested by their contract, to become partners by contributing their money, etc., to a lawful business, in the conduct of which, each shall not only act for himself, but as the agent of all, and shall share in the profits and losses. —Dixon v. Dixon, Mo., 181 S. W. 84.

99. **Patents**—Infringement.—On an accounting for infringement, as the hearing proceeds, each party should in the first instance pay the costs and expenses made by himself, including fees of the master and stenographer.—Panoulias v. National Equipment Co., U. S. D. C., 227 Fed. 1008.

100.——Specification.—A patentee is entitled to all that his patent fairly covers, even though its complete capacity was not recited in the specification and was even unknown to the inventor prior to the issuance of the patent.—Wayne Mfg. Co. v. Coffield Motor Washer Co., U. S. C. C. A., 227 Fed. 987.

101. **Principal and Agency**—Notice.—Where a third person dealing with an agent has actual knowledge of the scope of the agent's authority, or knowledge of facts which would put him on inquiry in respect thereto, he cannot rely on the agent's apparent authority.—City of Portland v. American Surety Co. of New York, Or., 153 Pac. 786.

102. **Railroads** — Contributory Negligence.—Where, in a traveler's action for injuries from being struck by a train at a crossing, the evidence showed that the plaintiff's attention was directed to an apparent danger and thereby distracted from the probable danger of an approaching train, contributory negligence was for the jury.—Corse v. Philadelphia & R. Ry. Co., N. J., 96 Atl. 53.

103.——Negligence per se.—Independently of a violation of rules, it is negligence for a train to be standing on a main track, 1,000 feet from any switch yard, when another train is due, without any precaution to advise the oncoming train.—Martin v. Kansas City Southern Ry. Co., Mo. App., 180 S. W. 1005.

104. **Sales**—Breach of Contract.—Where the buyer's offer to perform had been ignored, and the seller had stated to him that he would not deliver the hops sold, held that the buyer's failure to make any further offer to perform could not prevent him from recovering for breach of contract.—B. O. Schucking & Co. v. Young, Or., 153 Pac. 803.

105.——Contract.—Where purchaser of seed potatoes agreed to pay additional price if seller performed agreement as to buying crop grown therefrom, destruction of crop by fire before demand for its delivery held not to defeat liability for the additional price for the seed.—Varney v. Cole, Me., 96 Atl. 232.

106.——Express Warranty.—The warranties referred to in a provision of an order for adding machines, that "express warranties" would not be recognized unless approved by the plaintiff in writing, meant warranties by contract, verbal or written, and not implied warranties arising by operation of law.—Comptograph Co. v. Citizens' Bank of Minot, N. D., 155 N. W. 680.

107.——Principal and Agent.—Where a contract for the sale of cotton contained a "request" that, on the seller's failure to deliver, the buyer would go into the market and buy the number of bales sold, held, that such "request" rather conferred on the buyer the authority to buy than bound him to do so.—Miller v. McGhee Cotton Co., Ga., 87 S. E. 387.

108. **Search and Seizures**—Suspicion.—No amount of suspicion or incriminating evidence will justify a search of a house for stolen goods without a search warrant to search that particular house, unless the occupant consents.—Fennemore v. Armstrong, Del. Super., 96 Atl. 204.

109. **Statutes** — Repeal by Implication.—A statute is repealed by implication only where the new statute is clearly intended as a substitute for all previous law on the same subject and there is an irreconcilable conflict between the new statute and the old one.—Beck v. Cox, W. Va., 87 S. E. 492.

110. **Street Railroads**—Instructions.—In an action for injuries to an infant plaintiff on a street railroad's track, the instruction that, if plaintiff was being chased by some one, and ran onto the track and was injured, he could recover if the motorman was negligent, adequately dealt with the issue of the effect of the conduct of the third person.—Altaville v. Old Colony St. Ry. Co., Mass., 110 N. E. 970.

111. **Taxation**—Tax Deed.—A tax deed is not invalid because the tax sale was made by the sheriff's deputy.—Friedman v. Craig, W. Va., 87 S. E. 361.

112. **Trusts** — Evidence. — Where appellant loaned deceased money to enable him to acquire a parcel of land and deceased held the title for a number of years in his own name, the inference of a resulting trust is rebutted.—Reminger v. Joblonski, Ill., 110 N. E. 903.

113. **Vendor and Purchaser**—Action.—Where a vendor, after contracting to convey on the happening of a certain condition, conveys to a third person and thereby disables himself from performing, a cause of action immediately arises in favor of the vendee.—Boothe v. Dailey, Kan., 153 Pac. 551.

114.——Adverse Possession.—A purchaser will be required to take a title by adverse possession, especially when he has agreed not to object on that ground.—Stewart v. Kreuzer, Md., 95 Atl. 1052.

115.——Rescission.—There was no presumption that the agent of the owner of a quarry, authorized to act in the sale thereof and in regard to perfecting title thereto, was authorized to receive a letter from defendant buyer rescinding the contract and turning back the quarry to the owner.—McAlister v. St. Joseph Street Const. Co., Mo., 181 S. W. 54.

116. **Wills**—Construction.—It is presumed that, where a word is used in one sense in one part of the will, the same meaning was intended when it was used in another.—Keplinger v. Keplinger, Ind. App., 110 N. E. 698.

117.——Intention.—Courts will give effect to a will expressing an intention to pass a fee simple in addition to the language of a general devise without words of inheritance, which, nothing else appearing, gives only a life estate. —Gibson v. Brown, Ind. App., 110 N. E. 716.

118.——Legatee. — Testamentary provision, that residue should go to person or institution which should have cared for testator in his last sickness without naming any beneficiary, held to sufficiently make capable of identification the person who had cared for him during his last sickness as beneficiary so that she would take.—Lear v. Manser, Me., 96 Atl. 240.

119.——Life Estate.—Where testator gave a life estate to his wife in specified property, a subsequent clause giving a sister certain other property "subject to said life estate" did not give the wife a life estate in the property given to the sister, but the latter took the absolute estate.—Riverside Trust Co. v. Rogers, Conn., 96 Atl. 180.

120.——Limitation Over.—Will devising absolute estate to testator's four children, with limitation over on the death of any child without issue surviving to his surviving children, held an alternative gift to testator's children surviving at the death of a child who predeceased him.—Duering v. Brill, Md., 96 Atl. 296.

121.——Probate.—That testator has made an unreasonable, harsh, or unjust disposition of his property will not authorize revocation of the probate of a will.—In re Blackfeather's Estate, Okl., 153 Pac. 839.